Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

AIMEE ZMYSLY, AS REPRESENTATIVE AND GUARDIAN OF THE PERSON AND ESTATE OF YURIY ZMYSLY, A DISABLED ADULT,

Petitioner,

v.

UNITED STATES OF AMERICA, CHERRY POINT NAVAL HOSPITAL, DAVID KAPLAN, M.D., JAMES CHRISTOPHER, M.D., AND CHRISTOPHER OUDEKERK, CRNA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the *Feres* rule, as applied to claims for injuries to active-duty military personnel due to medical negligence and not arising out of combat activities or within an arena of combat, violates the equal protection guarantee of the Fifth Amendment and the fundamental right of access to the courts and should be overruled or limited in its application?

2. Whether treatment of *Feres* objections as a question of subject-matter jurisdiction and subject to immediate dismissal, denies a fundamental right of access to justice so as to prevent judicial evaluation of the context of the claim and thus the degree of deference due military decision-making in the matter, and improperly results in some non-employee defendants hiding behind the military's immunity and never revealing their employment status and eligibility for dismissal on *Feres* grounds?

PARTIES TO THE PROCEEDINGS

Petitioner is Aimee Zmysly, as representative and guardian of the person and estate of Yuriy Zmysly, a disabled adult. Respondent is the United States of America. Respondents are the United States of America, Cherry Point Naval Hospital, Doctors David Kaplan and James Christopher, and Nurse Christopher Oudekerk.

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PETITION FOR A WRIT OF CERTIORARI

Aimee Zmysly respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit (App. 21a) summarily affirmed the District Court's dismissal of this action on December 7, 2009 and treated a reply to a second summary affirmance motion as a motion for reconsideration (App. 25a), which it denied in an order dated December 14, 2009, both without published opinion. The statement of the United States District Court for the Northern District of Illinois (App. 1a, 3a), accompanying the court's order granting defendants' motion to dismiss is unreported.

JURISDICTION

The judgment of the Seventh Circuit was issued on December 7, 2009. The Seventh Circuit denied reconsideration of its order on December 14, 2009. (App. 25a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of the First Amendment guarantees that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances.

The Fifth Amendment guarantees that "No person [shall] be deprived of life, liberty, or property, without due process of law. . . ."

The relevant provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80, are reproduced at App. 27a.

INTRODUCTION

Yuriy Zmysly proudly served tours of duty of ten months in Afghanistan and seven months in Iran as a United States Marine. He returned to the United States a healthy 20-year-old. On January 9, 2006, while still in the Marine Corps and stationed in North Carolina, Yuriy experienced severe abdominal pain and sought medical attention at the emergency room of Cherry Point Naval Hospital. He was diagnosed with a perforated appendix and received an appendectomy. The botched surgery that took place left him severely disabled after he was totally deprived of oxygen.

Yuriy now lives as a severely disabled adult in Chicago. He has received some medical benefits, but those benefits have not covered the full extent of his medical and living needs. Because of his disabling injuries, Yuriy is unable to pay for necessary medical care and treatment.

Under this Court's decision in *Feres v. United States*, 340 U.S. 135 (1950), the lower courts believe no redress is available to Yuriy or those situated like him, despite the longstanding existence of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1291 *et seq.*, which waives sovereign immunity and authorizes certain tort actions against the United

States "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. In *Feres*, this Court created a non-textual exemption to the FTCA, holding that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146.

Like other courts, the District Court relied upon that statement to dismiss this action for lack of subject-matter jurisdiction without examining the circumstances of the injury, countervailing military concerns, or the identity of the named defendants. The mechanical application of *Feres* immunity in this manner threatens to undermine what this Court has called "[o]ne of the first duties of government" and the "very essence of civil liberty": to secure "the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

The United States implicitly recognized the propriety of this Court's review of the reach, application, and continuity validity of *Feres*, when it asked the Seventh Circuit to affirm summarily the District Court's dismissal of this action: "What plaintiff needs from this court is her ticket punched so she can raise her serious issues before the Supreme Court, the only court that can overturn sixty years of its own clear precedent." (App. 18a).

Feres has engendered repeated pleas for reconsideration by members of this Court, the lower courts, and the military justice system because of its arbitrary, confusing, and shifting applications. The time is right for this Court to reexamine *Feres*. The

nature of the military has changed dramatically since the decision was rendered, as has this Court's application of the equal-protection guarantee and its treatment of the right of access to the courts, both of which the doctrine implicates. *Feres* should not be immune from reexamination in light of today's military and today's constitutional doctrine.

STATEMENT OF THE CASE

A. Factual Background

At the time of the alleged medical negligence, Yuriy Zmysly was a United States Marine on active duty, stationed at the Marine Corps Air Station Cherry Point in North Carolina. He had served a tour of duty in Afghanistan and a tour of duty in Iraq, and had returned safely. He was 20 years old.

On January 9, 2006, Private Zmysly went to the emergency room at the Cherry Point Naval Hospital complaining of severe abdominal pain. The following day, he was diagnosed with a perforated appendix and scheduled for an immediate laparoscopic appendectomy. After the operation, Zmysly was extubated in the operating room, but quickly became hypoxic and showed signs of respiratory distress. An attempt to reintubate him was unsuccessful. A code was called, and an emergency cricothyroidotomy was performed to establish a surgical airway. By the time Yuriy was resuscitated and able to breathe again, he had suffered catastrophic anoxic brain injury due to lack of oxygen. As a consequence, he is permanently and severely disabled.

B. Proceedings Below

On January 8, 2008, Yuriy filed an administrative medical negligence claim under the Federal Torts Claim Act, 28 U.S.C. § 2671 *et seq.* ("FTCA") with the United States government, which denied the claim. On October 24, 2008, Aimee Zmysly, as representative and guardian of her husband, Yuriy Zmysly, filed this action pursuant to the FTCA, alleging medical negligence on the part of the United States through its agents or employees and naming each of the medical personnel individually.

The government moved to substitute the United States as defendant for Dr. James Christopher and nurse anesthetist Chris Oudekerk, who it said were acting within the scope of their employment, and moved to dismiss the action. Co-defendant Dr. David Kaplan retained private counsel. On January 30, 2009, defendant Kaplan moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) based on a claim that the certificate of merit attached to the complaint as required by Illinois law, was inadequate. On March 5, 2009, the United States filed a motion to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1) based on the *Feres* Doctrine. The District Court dismissed the case as to all defendants for lack of subject matter jurisdiction, relying solely on *Feres*, on August 20, 2009. App. 1a, 3a.

Plaintiff appealed. On November 18, 2009, the United States filed a motion for summary affirmance, stating that "[w]hat the plaintiff needs from this court is her ticket punched and so she could raise her serious issues before the Supreme Court, the only court that can overturn sixty years of its own clear precedent." App. 18a. On December 3,

2009, defendant Kaplan filed a motion for summary affirmance, adopting the arguments of the United States and asserting waiver of any non-*Feres* arguments against Kaplan, though still never identifying Kaplan's employment status for *Feres* purposes.

On December 7, 2009, the Seventh Circuit granted summary affirmance for the United States, stating that "it doesn't matter whether the initial need for medical care arose because, for example, an active duty service member was shot by enemy fire or was injured playing basketball or having his appendix removed." App. 23a. In response to Zmysly's opposition to Kaplan's summary affirmance motion and alternative request to reset the briefing schedule filed on December 10, 2009, the Seventh Circuit, on December 14, 2009, treated the filing as a request for rehearing, which it denied, stating "Appellant has forfeited any argument that Kaplan is legally distinct from the other four defendants." App. 26a.

REASONS FOR GRANTING THE PETITION

This case presents issues of great national importance relating to the constitutional rights of the men and women who serve this country in the military. While military order and discipline have a heightened call upon their conduct and result in a rescission of some of their rights in particular circumstances, those considerations evaporate where vindication of those rights poses no burden on military command and obedience. In situations like the one presented here, the diminution of their rights through unequal treatment and undue limitations of

their rights to redress cannot be reconciled with the same rights they risk their lives to protect.

The conflict between the Seventh Circuit's categorical subject-matter jurisdiction approach to *Feres* and the balancing tests employed in other circuits and in all other disputes between the military and its personnel is stark and in need of this Court's attention. The implementation of *Feres* immunity by the lower courts here and in other similar instances admits no consideration of context and heightens the discrimination improperly visited upon members of our military service, while often producing indefensible and occasionally absurd results.

The flat ban on the hearing of service members' medical-malpractice claims employed by the Seventh Circuit contrasts sharply with the well-established truism that not all disputes between the military and its personnel are beyond redress in the civilian courts. In a nation that boasts that there are no second-class citizens, the more than 1.4 million people who serve in the active Army, Navy, Marine Corps, and Air Force, and more than one million others who serve in their reserve components,[1] have been relegated to a secondary status when it comes

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[1] Bureau of Labor Statistics, Occupational Outlook Handbook, 2010-11, http://www.bls.gov/oco/ocos249.htm (last visited Mar. 2, 2010). In fact, the Department of Defense declares with great pride, "we are the nation's largest employer." U.S. Dep't of Defense, DOD101: An Introductory Overview of the Department of Defense, http://www.defense.gov/pubs/ dod101/index.html (last visited Mar. 2, 2010).

to redress for medical error.[2] Because the "military health care system is one of the largest health care systems in the nation,"[3] and a certain amount of medical error resulting from negligence will undoubtedly occur, the problem posed by this Petition is a recurring one of great practical significance.

This Court should not wait upon Congress to remedy the unequal treatment visited upon military members and their families by *Feres*. Congressional inaction is not a reliable indicator that lawmakers approve the Court's construction of an unexpressed exception within the FTCA and should not dissuade this Court from reconsidering its own precedent, when, as here, it implicates constitutional rights. This Court alone is ultimately responsible for guaranteeing equal protection of the law to all Americans.

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[2] *See* Edwin F. Hornbrook & Eugene J. Kirschbaum, *The Feres Doctrine: Here Today—Gone Tomorrow?* 33 Air Force L. Rev. 1, 11 (1990) ("Because they cannot bring suit, although even federal prisoners can, military personnel are sometimes referred to as second-class citizens."). At least one federal appellate judge agrees, declaring that *Feres* immunity "effectively declares that the members of the United States military are not equal citizens, as their rights against their government are less than the rights of their fellow Americans." *Costo v. United States*, 248 F.3d 863, 870 (9th Cir. 2001) (Ferguson, J., dissenting). *See also Persons v. United States*, 925 F.2d 292, 299 (9th Cir. 1991) (terming this irrational discrimination a "glaring anomaly").

[3] Congressional Budget Office, Restructuring Military Medical Care (July 1995), *available at* http://www.cbo.gov/doc.cfm?index=5309&type=0.

I. *FERES* IS RIPE FOR RECONSIDERATION, IN LIGHT OF ITS IMPLICATIONS FOR THE CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL AND THE CONTINUING PROTESTS OF LOWER COURTS OVER ITS APPLICATION

> This Court has applied the *Feres* doctrine multiple times, though it has never addressed its impact on service members' constitutional rights. Since the original decision in *Feres*, the relevant constitutional rights implicated, equal protection and access to the courts, have undergone doctrinal advances and has had application to military personnel unforeseen by the *Feres* Court. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677 (1973).

Neither the lengthy tenure of *Feres* nor the various rationales put forth in its favor should give this Court pause in finding reason to review its present validity as applied to instances of medical malpractice occurring outside the arena of war.

As this Court recently stated, "[r]evisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule . . . , and experience has pointed up the precedent's shortcomings." *Pearson* v. *Callahan*, --- U.S. ----, 129 S. Ct. 808, 816 (2009) (overruling *Saucier* v. *Katz*, 533 U.S. 194 (2001)). Each of these considerations supports review here. First, the denial of subject-matter jurisdiction over medical-malpractice claims

by active-duty service members, as opposed to the acceptance of jurisdiction over identical claims by the same service members' families,[4] does not affect the way that military hospitals order their affairs. Moreover, abrogation of *Feres* in this context imposes no unusual liability. Medical malpractice is a well-recognized and centuries-old cause of action, well within the competence of a civilian court and cognizable under local law as if the "defendant were a private party;" it does not impose "'novel and unprecedented liabilities,'" as the *Feres* Court feared. *United States v. Brown*, 348 U.S. 110, 113 (1954), quoting *Feres*, 340 U.S. at 142.[5] In fact, the *Feres* Court itself noted, the "Tort Claims Act was not an isolated and spontaneous flash of congressional generosity." *Feres*, 340 U.S. at 139. Instead, it "marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Id.*

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[4] A RAND study established that 8.5 million beneficiaries in the United States utilize the military health services system. Susan D. Hosek, *et al.*, RAND, *The Demand for Military Health Care* 3 (1995). These numbers include family members of service personnel, veterans and non-active duty beneficiaries, *see* 10 U.S.C. §§ 1071-1106, none of whose medical-malpractice claims are subject to dismissal under *Feres*. *See United States v. Brown*, 348 U.S. 110 (1954) (veterans); *Brown v. United States*, 462 F.3d 609 (6th Cir. 2006) (minor dependant injured prenatally when mother was an active-duty service member).

[5] The *Brown* Court ruled that the service member's receipt of government benefits for his injury should reduce, but not bar, his claim under the FTCA. *Id.* at 111 n*.

Second, the *Feres* doctrine was a judge-made exception to the FTCA, Jonathan Turley, *Pax Militaris: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance,* 71 GEO. WASH. L. REV. 1, 3 (2003), with no textual basis. *United States v. Johnson*, 481 U.S. 681, 693-703 (1987) (Scalia, J., dissenting). The exception was not the result of congressional choice, but engrafted upon the statute by judicial decision. Criticism of the rule and its various rationales has found broad expression, both by members of this Court and by lower court judges. Thus, Justice Scalia, writing for the four dissenting Justices in *Johnson,* termed the rule's various rationales "absurd," "unpersuasive," and lacking support in the statutory text. 481 U.S. at 695-96 (Scalia, J., dissenting). These dissenters added, "*Feres* was wrongly decided and heartily deserved the 'widespread, almost universal criticism' it has received." *Id.* at 700 (Scalia, J., dissenting) (citation omitted). Typical of lower court decisions critical of the rule is the statement made by the Third Circuit in *Richards v. United States*, 176 F.3d 652, 657 (3d Cir. 1999), where the court stated:

> we are left with a counter-intuitive and inequitable result simply because of Private Richards's military status. It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it.

In the Seventh Circuit, where the present case was decided, the court has reluctantly followed *Feres* while noting that there is but a "tenuous link between these rationales [described in *this Court*'s

decisions] and malpractice cases." *Selbe v. United States*, 130 F.3d 1265, 1268 (7th Cir. 1997). Nonetheless feeling constrained by this Court's decisions, the court below reasoned that dismissal was mandated because "it doesn't matter whether the initial need for medical care arose because, for example, an active duty service member was shot by enemy fire or was injured playing basketball or having his appendix removed." App. 23a.

The doctrine's manifest unfairness and questionable origins has led an increasing number of federal appellate judges to call for this Court's reconsideration. *See, e.g., Matreale v. New Jersey Dep't of Military & Veterans Affairs*, 487 F.3d 150, 159 (3d Cir. 2007) (Smith, J., concurring) ("The doctrine of intra-military immunity remains ripe for reconsideration by the Supreme Court in light of the questionable foundation upon which it stands."); *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001) (Ferguson, J., dissenting); *O'Neill v. United States*, 140 F.3d 564, 566 (3d Cir.1998) (Becker, C.J., statement sur denial of petition for rehearing) ("I urge the Supreme Court to grant certiorari and reconsider *Feres*."). Judge Calabresi, writing for the Second Circuit has suggested that this Court "abandon the doctrine altogether." *Taber v. Maine*, 67 F.3d 1029, 1038 (2d Cir. 1995).

These calls for reexamination have been echoed by jurists and others within the military justice system. In 2001, the National Institute of Military Justice established a Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice, chaired by Senior Judge Walter Cox of the Court of Appeals for the Armed Forces. Although focused primarily on the operation of the military justice

system, the Cox Commission found that *Feres* was so detrimental and unfair as to raise concerns about its adverse impact on military discipline:

> [M]any former service members have been frustrated by its constraints on their ability to pursue apparently legitimate claims against the armed forces, many of which bear little if any relation to the performance of military duties or obedience to orders on their merits, . . . Revisiting the *Feres* Doctrine would also signal to service members that the United States government is committed to promoting fairness and justice in resolving military personnel matters.

Honorable Walter T. Cox, III *et al.*, *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice* § IV.C. (May 2001).

Other members of the military justice community have pointed out the fact that *Feres* "works such a severe injustice on military personnel and their families. . . . is patently obvious and very well known." Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. Rev. Mich. St. U. Det. C.L. 57, 120-21. More recently, an Army Judge Advocate published an incisive and critical analysis, concluding that the immunity is too broad and operates against its purported objective of preserving military discipline. Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 Mil. L. Rev. 1, 4-5 (2007).

Reconsideration of *Feres* is not just warranted but overdue.

II. THIS COURT'S GUIDANCE IS NEEDED TO DETERMINE WHEN AND UNDER WHAT CIRCUMSTANCES THE CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL SHOULD BE RECOGNIZED

A. Whether the Unequal Treatment of Military Personnel under *Feres* Violates their Right to Equal Protection Is an Important Question of Federal Law that Has Not Been, But Should Be, Settled by this Court

This Court has applied *Feres* multiple times, though it has not addressed its impact on service members' constitutional rights. In fact, the last time this Court applied the rule, in *United States v. Johnson*, 481 U.S. 681 (1987), the Court noted it was not asked to overrule *Feres*, *id.* at 689 n.9, and the 5-4 majority "decline[d] to modify the doctrine at this late date." *Id.* at 688.

Reexamining *Feres* through a constitutional prism is long overdue. It is axiomatic, as Chief Justice Earl Warren once wrote, that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962) (relying on *Burns v. Wilson*, 346 U.S. 137 (1953)). After all, classifications are subject to judicial scrutiny to determine whether they are "'reasonable in light of its purpose.'"

Carrington v. Rash, 380 U.S. 89, 92 (1965) (quotation omitted).

While some rights of service personnel must recede at times because of the exigencies of military command and discipline, *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), a categorical rule abrogating the vindication of those rights, regardless of the circumstances, as the Seventh Circuit said *Feres* demands, constitutes invidious discrimination against military personnel.[6]

Equal protection requires that "all persons similarly situated . . . be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Not only is the right to sue under the FTCA available to civilians, including civilian employees and contractors engaged in the same activities performed by military personnel, but other service members and their families are entitled to sue for money damages in situations that defy reasonable distinction from Private Zmysly's case.

For example, this Court has held that *Feres* does not bar a veteran's claim of negligent treatment at a VA hospital after his discharge from the army, even when the medical treatment was for an injury incurred during active duty. *United States v. Brown*,

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[6] Justice Black, writing for the *Brown* dissenters, recognized this unfairness: "To permit a veteran to recover damages from the Government in circumstances under which a soldier on active duty cannot recover seems like an unjustifiable discrimination which the Act does not require." 348 U.S. at 114 (Black, J., dissenting).

348 U.S. 110, 112 (1954).[7] One way of looking at that is to consider Zmysly's injury as less "incident to service" than Brown's. Unlike Brown's injury, Zmysly's appendicitis was not caused by any military activity. Still, if Zmysly had undergone his appendectomy the day after his discharge, the doors of the district court would have been open to him, even if his cause of action were identical in every other respect to the action dismissed by the District Court below.

It is also true that if Zmysly's civilian wife, who was eligible for the same military health services by virtue of his active-duty status, had entered Cherry Point Naval Hospital with the same complaint and had been tragically injured on the operating table as he had, *Feres* would have posed no bar to his bringing an action on her behalf as well as one for his own loss of consortium. Such an action would call into question the skill and judgment of the very same medical personnel involved in the action dismissed below. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 201, 203 (2d Cir. 1987) (noting the "anomalous" result "that a serviceman-husband performing his military duty would be denied recovery against the Government whose employee's negligence may have caused him serious injury, while his spouse is

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[7] There is no logical distinction here between the military veteran and the active-duty soldier. Both are eligible for military health care, and "a retired soldier, continues in the military service of the Government, is subject to military discipline and has claim for medical and dental care in military institutions." *Watt v. United States*, 246 F.Supp. 386, 388 (E.D.N.Y. 1965) (noting also the difference is active duty personnel are "entitled" to such care, while retired soldiers may receive it subject to availability).

allowed recovery as a consequence of the same set of facts.").

Similarly, *Feres* would not bar an action by Zmysly for injury to his child during an appendectomy at Cherry Point Naval Hospital, even though the child was entitled to care at the facility solely as a dependent of an active-duty service member. In such a situation, Zmysly would be entitled to seek money damages for his own loss due to the negligent treatment of his child. *See, e.g., Bravo v. United States*, 532 F.3d 1154 (11th Cir. 2008) (active-duty naval service member recovered loss of consortium damages as a result of negligent injury to dependent son at Navy hospital); *Lebron v. United States*, 279 F.3d 321 (5th Cir. 2002) (active-duty service member recovered economic damages and loss of consortium as a result of medical malpractice injury to child at Army hospital).

B. Evaluation of Claims by Military Personnel in Other Circuits as Well as Outside the *Feres* Context Proceeds Differently But No Rational Distinction Justifies Treating FTCA Claims Differently

This Court has sent lower courts mixed signals on the application of *Feres*. In *United States v. Shearer*, 473 U.S. 52 (1985), for example, this Court admonished lower courts that application of the *Feres* Doctrine "cannot be reduced to a few bright-line rules," emphasizing instead a fact-intensive inquiry of the circumstances surrounding the individual case. 473 U.S. at 57 (further noting that the "situs" of the injury "is not nearly as important as whether the suit requires the civilian court to

second-guess military decisions, and . . . impair essential military discipline."). Yet, just two years later, this Court described *Feres* as a categorical rule that "has been applied consistently to bar all suits on behalf of service members against the Government based upon service-related injuries." *Johnson*, 481 U.S. at 687-88. As a result, some circuits have grudgingly applied *Feres* mechanistically to foreclose all lawsuits by service personnel, as did the Seventh Circuit below, while others have employed balancing tests that examine whether the rationales behind the doctrine articulated by this Court are implicated.

The Seventh Circuit's treatment of *Feres* contrasts with the individualized determinations made in other circuits and applicable in other areas of legal dispute involving the same personnel. Accurately describing the law still applied in other circuits, Justice Kennedy, as a judge on the Ninth Circuit, recognized the balancing inherent in any case where rights are invoked by members of our armed forces: "[w]hile it is clear that one does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces." *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980).

A review of the case law inexorably leads to the conclusion that, while "[c]ivilian courts must at very least hesitate long before entertaining suit which asks the court to tamper with established relationship between enlisted military personnel and their superior officers," *Chappell*, 462 U.S. at 300, "[n]ot every claim arising from a military decision

presents a nonjusticiable controversy." *Adkins v. United States*, 68 F.3d 1317, 1323 (Fed. Cir. 1995).

Thus, for example, this Court has recognized that considerations of the military's special status does not require deference when the issue involves certain types of gender discrimination, *see, e.g., Frontiero*, 411 U.S. 677 (military may not discriminate on eligibility for benefits), even if other allegations of gender discrimination are outside judicial cognizance when they involve the combat arena. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57 (1981) (Congress may require a male-only military draft). *But see Bledsoe v. Webb*, 839 F.2d 1357 (9th Cir. 1988) (finding claim brought by a female civilian employee of a military department and premised on denial of embarkation privileges exclusively because of gender is justiciable).

Outside of medical-malpractice claims, courts often look at the facts and circumstances of military personnel claims and the deference owed the military. Thus, for example, the Third Circuit rejected an analysis to claims of military personnel that erroneously mixed "the concept of justiciability with the standards to be applied on the merits." *Dillard v. Brown*, 652 F.2d 316, 323 (3d Cir. 1981). That court further declared, "[i]f the military justification outweighs the infringement of the plaintiff's individual freedom, we may hold for the military on the merits, but we will not find the claim to be non-justiciable." *Id.* at 323-24. *Feres* usually operates differently from those rules, without rational justification.

After all, this Court has acknowledged that it has never held "that military personnel are barred from

all redress in civil courts for constitutional wrongs suffered in the course of military service." *Chappell*, 462 U.S. at 304-05. While Zmysly's underlying claim for medical malpractice does not seek redress for a constitutional wrong, his challenge to the constitutionality and application of *Feres* to his case does, yet can only be heard by this Court, which alone may reconsider *Feres*.

It is only in the category of cases covered by *Feres* that the courts have ever employed a categorical rule against justiciability that dismisses an action without even an opportunity to raise what the United States conceded are "serious issues." App. 18a. The *Feres* category of cases, however, are not *sui generis* and do not support such a distinction from other disputes between the military and its personnel.

In the Ninth, Tenth, and Eleventh Circuits, a four-part test informs the applicable analysis, weighing: (1) the nature and strength of the plaintiff's claim; (2) the potential injury to the plaintiff if review were denied; (3) the type and extent of potential interference with the military function that judicial review would involve; and (4) the extent to which military expertise or discretion is involved. *See, e.g., Wenger v. Monroe*, 282 F.3d 1068, 1072 (9th Cir. 2002); *Pringle v. United States*, 208 F.3d 1220, 1224 (10th Cir. 2000); *Rucker v. Secretary of the Army*, 702 F.2d 966, 969 (11th Cir. 1983); *but see Pierce v. United States*, 813 F.2d 349, 352-54 (11th Cir. 1987) (employing a three-part test). The Fifth Circuit utilizes a similar three-part test. *See Parker v. United States*, 611 F.2d 1007, 1013-15 (5th Cir. 1980). The Second Circuit, rejecting those approaches, adopted a standard that is analogous to

the "scope of employment" standard in workers compensation cases. *Taber*, 67 F.3d at 1049-50.

No persuasive reason exists to take a different approach to cases within the *Feres* category, raising serious and profound issues about the unequal treatment of these claims.

C. Confusion About *Feres* Has Engendered Inconsistent Results in the Circuits, Including Results that Can Only be Characterized as Absurd

The shifting and inconsistent rationales advanced to support the *Feres* doctrine have understandably engendered confusion among the circuits. *See Taber*, 67 F.3d at 1038 (*Feres* "has become an extremely confused and confusing area of law."). In many instances, as here, the justifications advanced are either inapplicable or too attenuated to support the classification. *Cf. City of Cleburne*, 473 U.S. at 446; *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 536-38 (1973). In a large number of cases, some circuits have avoided categorical application of *Feres* non-justiciability by focusing on the inapplicability of the rationales adopted by this Court as a doctrinal matter. *See e.g., Regan v. Starcraft Marine, LLC*, 524 F.3d 627 (5th Cir. 2008) (using three-part test to find service member injured in boating accident at military facility was not *Feres*-barred); *Schoenfeld v. Quamme*, 492 F.3d 1016 (9th Cir. 2007) (lawsuit not barred for serviceman who lost his leg when vehicle crashed into previously damaged, but unrepaired, guardrail on military base); *Dreier v. United States*, 106 F.3d 844 (9th Cir. 1996) (wrongful-death action not barred where soldier fell into on-base wastewater drainage channel after off-duty afternoon of beer

drinking); *Taber, supra* (no bar to lawsuit by off-duty serviceman for injuries sustained in automobile accident with another off-duty serviceman, who had been drinking on base); *Cortez v. United States*, 854 F.2d 723 (5th Cir. 1988) (widow of army specialist who was hospitalized for mental disorders and who jumped from an eighth-floor window to his death not barred because hospitalization was not incident to service); *Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983) (officer could maintain action for automobile accident injuries following after-hours party at NCO club); *Mills v. Tucker*, 499 F.2d 866 (9th Cir. 1974) (survivors of naval officer could bring action for fatal traffic accident on naval roadway as decedent was returning from civilian moonlighting job to his navy-owned quarters); *Hand v. United States*, 260 F. Supp 38 (M.D. Ga. 1966) (serviceman on 24-hour pass struck by Army jeep negligently operated by a soldier acting within the scope of his duties could maintain FTCA action because injuries were not incident to service).

A consequence of the increased number of women service members has been to magnify the *Feres* rule's arbitrariness, particularly in the area of medical negligence. *Compare, e.g., Scales v. United States*, 685 F.2d 970 (5th Cir. 1982) (barring cause of action for harm to child due to negligent prenatal care in providing rubella vaccine to mother while pregnant and on active duty), *with Brown v. United States*, 462 F.3d 609 (6th Cir. 2006) (rejecting *Scales* and finding no *Feres* bar to action by parent of child born with spina bifida caused by military doctor's prescription of prenatal vitamins to child's mother while on active duty with the Navy), and *Romero v. United States*, 954 F.2d 223, 226-27 (4th Cir. 1992) (*Feres* did not bar recovery for injuries to the child of active duty

Navy parents born with cerebral palsy due to inadequate prenatal care by military doctors.).

Even within the medical malpractice area, disparate results obtain. *Compare Maas v. United States*, 94 F.3d 291, 296 (7th Cir. 1996) (finding no *Feres* bar to claimed failure to warn discharged serviceman of increased risk of cancer due to exposure to nuclear weapons fragments while on active duty), and *M.M.H. v. United States*, 966 F.2d 285, 288-89 (7th Cir. 1992) (no *Feres* bar to claim that Army had negligently failed to notify soldier post-discharge that it had previously erred in telling her she was HIV-positive); with *Maddick v. United States*, 978 F.2d 614, 616 (10th Cir. 1992) (*Feres* barred claim by former Navy diver that government doctors should have warned him post-discharge that his diving activities put him at risk of degenerative bone disease.).[8]

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[8] Adding to the arbitrariness of the rule are decisions that claims by ROTC cadets are *Feres*-barred despite the fact that they not on active duty. *E.g., Lovely v. United States*, 570 F.3d 778 (6th Cir. 2009); *Brown v. United States*, 151 F.3d 800, 805 (8th Cir. 1998) (medical negligence claim). At the same time, there is a split among the circuits as to whether injury to service members on the Temporary Disability Retirement List, who are removed from active duty, are nonetheless *Feres*-barred. *Bradley v. United States*, 161 F.3d 777, 782 (4th Cir. 1998); *See generally* Hilde Conte-Pearlstein, *TDRL and the Feres Doctrine*, 43 A.F. L. REV. 259 (1997). *Cf. Sloan v. United States*, No. 99-2991, 2000 WL 307264 (8th Cir. Mar. 27, 2000) (unreported) (claim of widow of Air Force sergeant who died of complications following surgery was barred by *Feres* because the patient's placement on the TDRL was not effective until the following day).

Feres's arbitrary distinctions can also lead to absurd results. In *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987), an active-duty sailor alleged that negligent prenatal care at a naval medical center resulted in injury to herself and to her twin boys. One, Frederick, was left with permanent injuries, and the other, Michael, died within a few days. The Eleventh Circuit ruled that under *Feres*, Del Rio could not recover for her own injuries, she could recover in a suit on behalf of Frederick, but not Michael, all based on the same negligent actions by the same medical personnel. *Id.* at 286-88.

This Court's guidance is needed to settle whether *Feres* constitutes a categorical bar or one that requires a balancing of interests, as the circuits have diverged.

D. The Confusing, Shifting and Difficult Rationales for the *Feres* Doctrine Provide No Rational Basis for Adverse Treatment of Military Members and Support Reexamination by this Court, Particularly in Cases Alleging Non-combat Medical Negligence

The *Feres* rule has no compelling rationale and certainly no rationale that supports a distinction between tort actions and other legal disputes between the military and its personnel. The bases advanced to justify the rule have been multiple, confused, and shifting. Consequently, any relationship between the adverse treatment of military members and each "asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Clebourne*, 473 U.S. at 446.

The first rationale set out in *Feres*, which included claims of medical malpractice, was that "plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States." 340 U.S. at 141, quoting 28 U.S.C. § 2674. This Court soon distanced itself from that view in *Brown*, 348 U.S. 110, where it specifically held allegations of medical malpractice by government medical personnel did not "visit the Government with novel and unprecedented liabilities," but rather were claims "which might be cognizable under local law, if the defendant were a private party." *Id.* at 112-13. The Court abandoned the unique-liability rationale for *Feres* altogether in *Indian Towing v. United States*, 350 U.S. 61, 64-69 (1955).

Secondly, the *Feres* Court asserted that "[t]he relationship between the Government and members of its armed forces is distinctively federal in character" and that the government's liability should not be governed by the peculiarities of the local law of a place the plaintiff had not chosen. 340 U.S. at 143. The Court rejected precisely that reasoning in *United States v. Muniz*, 374 U.S. 150 (1963), and held that federal prisoners could sue under the FTCA, though their claims would be governed by the tort law of the state where they were involuntarily located. *Id.* at 161-62. The Court appeared to resurrect this uniformity rationale in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), extending its reasoning to protect a government contractor from suit under state laws. *Id.* at 672. However, in *United States v. Shearer*, 473 U.S. 52 (1985), the Court stated that this rationale was "no longer controlling," *id.* at 58 n. 4, yet invoked it once again in *Johnson* where this Court noted that

"federal relationship is implicated to the greatest degree when a service member is performing activities incident to his federal service," such as a "military function" that "entails a [s]ignificant risk of accidents and injuries." 481 U.S. at 689, (internal quotation and citation omitted). If, as *Johnson*, suggests, the federal-relationship rationale has a lesser gravitational pull in cases where the soldier was not performing a military function, then the Seventh Circuit's categorical rule is entirely inappropriate in a medical malpractice case like the instant action.

The third *Feres* rationale drew a parallel to the exclusivity of workers compensation benefits where government provides "simple, certain, and uniform compensation for injuries or death of those in armed services," and assumed that Congress did not intend to permit service members to seek additional compensation through damage suits. 340 U.S. at 144.

The Court rejected that reasoning four years later:

> We noted in the *Brooks* case that the usual workmen's compensation statute was in this respect different from those governing veterans, that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy, that the receipt of disability payments under the Veterans Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter Act. We adhere to that result."

Brown, 348 U.S. at 113 (citation omitted).

Courts have not only allowed FTCA recovery to recipients of benefit programs, but have consistently applied the *Feres* bar against claimants who were *not* eligible for government benefits.[9] *Sidley v. United States Dep't of Navy*, 861 F.2d 988 (6th Cir. 1988), held that a serviceman's claim that Navy doctors negligently treated his fractured leg following a motorcycle accident that occurred while the serviceman was off base and off-duty was barred by *Feres*, despite the fact that he was not eligible for compensation under the Veterans' Benefit Act. The court stated that while VBA compensation "makes the sometimes harsh effect of the *Feres* doctrine more palatable, the denial or unavailability of these benefits does not affect the applicability of the *Feres* doctrine." *Id.* at 991. *See also Bowers v. United States*, 904 F.2d 450, 452 (8th Cir. 1990) (*Feres* barred claim for medical malpractice during a pre-induction physical, even though plaintiff was not a service member at the time of the alleged negligence and was not eligible for veterans' benefits).

The *Shearer* Court explicitly held that this "additional-compensation" rationale, too, was also "no longer controlling." 473 U.S. at 58 n.4.

A fourth justification was not set out in *Feres*, but explained by this Court four years later as based on

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[9] In the Complaint, Zmysly alleged that, although he had received some medical benefits, he had not received all the necessary and adequate medical care and treatment he has needed through the United States, its military, or its health network and that the Zmyslys are unable to pay for the care and treatment he needs.

"peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty." *Brown*, 348 U.S. at 112. The Court thereafter indicated that the military-discipline explanation rationale was the "best" rationale for the *Feres* immunity. *Shearer*, 473 U.S. at 57; *Chappell*, 462 U.S. at 299. *See also Overton v. N.Y. State Div. of Military & Naval Affairs*, 373 F.3d 83, 89-90 (2d Cir. 2004) ("the *Feres* doctrine is designed in large measure to prevent civilian courts from interfering with military discipline and decision-making.").

It is difficult to see how barring Zmysly and other victims of stateside, non-combat-related medical negligence from seeking compensation from the government for care and treatment made necessary by the negligence of government medical personnel furthers this interest. Not only were his treating health care providers not superior officers (and, in at least one case, a civilian), but they were not engaged in anything that might remotely be characterized as a military operation or anything incident to a military operation. In short, liability would not require a court to intrude on sensitive military affairs, second-guess military decision-making, or somehow impair military effectiveness. For that reason, the Seventh Circuit has recognized that there is but a "tenuous link between these [discipline and decision-making] rationales and malpractice cases," even as it felt constrained to dismiss medical malpractice actions pursuant to *Feres* and its categorical approach. *Selbe*, 130 F.3d at 1268.

III. THE *FERES* RULE DEPRIVES MEMBERS OF THE MILITARY SERVICES OF THE FUNDAMENTAL RIGHT TO SEEK LEGAL REDRESS FOR INJURY GUARANTEED TO ALL OTHER AMERICANS AND MERITS APPLICATIONS OF STRICT SCRUTINY

The Seventh Circuit's categorical approach to *Feres* implicates two separate aspects of the fundamental right of access to the courts. First, it permits a defendant like Dr. Kaplan here, to hide his employment status, move for dismissal on non-*Feres* grounds, and benefit from the government's *Feres* motion. To this day, Dr. Kaplan has given no indication whether he was a government employee, a contractor, or a consultant at the hospital.

Zmysly's only indications of Dr. Kaplan's status was in footnote in the government's motion for a 45-day extension of time, filed December 23, 2008, indicating that Kaplan was employed by a contractor for the United States (U.S. Dist. Ct. Doc. 16; U.S. Mot. for Ext. of Time 2 n.1.), and a footnote in the government's motion for summary affirmance in the Seventh Circuit, this time calling Kaplan a "contractor with the United States," not within the FTCA's definition of a federal employee, and who is "represented by private counsel." (App. 19a n.3.). In his own appellate motion for summary affirmance, Kaplan sought affirmance on *Feres* grounds, as if he were a civilian employee of the government.

By treating *Feres* immunity as a subject-matter jurisdiction issue as to all defendants, the courts below foreclosed any discovery that would permit Zmysly to determine the employment relationship, if

any, between the United States and Dr. Kaplan. Petitioner was thus denied any opportunity to argue that *Feres* immunity did not apply to Dr. Kaplan. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 510 (1988) (rejecting *Feres* as a defense for government contractors because it would be "in some respects too broad and in some respects too narrow."); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1346-49 (11th Cir. 2007) (rejecting application of *Feres* to government contractors not involved in sensitive military judgments); *Chapman v. Westinghouse Elec. Corp.*, 911 F.2d 267, 272 (9th Cir. 1990). In essence, Dr. Kaplan's strategy of laying low as the United States sought immediate dismissal cut off Zmysly's opportunity to pursue an action that might not otherwise have been barred by *Feres*, merely because the District Court dismissed all defendants on *Feres* grounds and Petitioner had no opportunity to discover Dr. Kaplan's real status. This anomaly in applying a categorical approach warrants this Court's attention.

Second, *Feres* also operates in the Seventh Circuit to dismiss causes of action against the government that a balancing of interests test, as used in other circuits, may not bar. After all, *Feres* is not a rule that simply allocates economic benefits or regulatory burdens. It closes the courthouse doors to a class of persons seeking redress for wrongful injury. The right to seek such legal recourse is a foundational principle deeply rooted in the common law. This Court has described the right of access to the courts as "one of the highest and most essential privileges of citizenship." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Moreover, "it is the right conservative of all other rights, and lies at the foundation of orderly government." *Id.*

The American constitutional version of the right reflects Sir Edward Coke's influential study, which concluded that Magna Carta expressly guaranteed that "every subject of this realme, for injury done to him ... by any other subject ... without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* *55 (London, E. & R. Brooke 1797). *See also* Edward Corwin, *The "Higher Law" Background of American Constitutional Law,* 42 Harv. L. Rev. 365, 393 (1929).

Sir William Blackstone's subsequent influential treatise on the English common law established that the right of access to courts was "the right of every Englishman" to "apply[ ] to the courts of justice for redress of injuries." 1 William Blackstone, *Commentaries on the Laws of England* * 141 (8th ed. 1778).

While existence of the right of access to the courts did not compel the government to waive sovereign immunity, Congress did so in enacting the FTCA in 1946. Having done so without textual exception for the non-combat-related medical malpractice injuries, the question of first impression presented here is whether these members of the armed forces may be non-suited for their claims when members of their families, non-active duty personnel, and veterans can make identical claims in court. Having undertaken to waive sovereign immunity, the government may not arbitrarily—or, because a fundamental right is implicated, may not without compelling reasons—deny that remedy to a similarly situated class of people. *Cf. Goldberg v. Kelly,* 397 U.S. 254 (1970).

Once Congress has opened the doors of the district court to claims for money damages for harms caused by government employees, including negligent medical care, exclusion of Zmysly and other active-duty members of the armed forces from that remedy can stand only if necessary to further a compelling governmental interest.

At a time when Americans' attention is focused on the efforts of our armed forces to protect them, it is a cruel irony that the law denies them the recourse for wrongful injury that is available to others similarly situated in every respect except status as active-duty military. It is a discrimination that touches upon the fundamental right of access to the courts, warranting not only this Court's attention, but its strict scrutiny. This Court should grant the Petition to require the government to make a showing of compelling justification.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

March 15, 2010 Respectfully submitted,

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APPENDIX

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APPENDIX A:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
JUDGMENT IN A CIVIL CASE
(AUG. 20, 2009)

JUDGMENT IN A CIVIL CASE
Case Number: 08-C-6111

Zmysly

v.

United States of America, *et al.*

AO 450 (Rev. 5/85) Judgment in a Civil Case

Case 1:08-cv-06111 Document 55

Filed 08/20/2009

United States District Court
Northern District of Illinois
Eastern Division

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that for the reasons provided in this Minute Order, the Court grants defendants' motion to dismiss [doc. no. 38] because it lacks subject matter jurisdiction. All

other motions pending before this Court are dismissed as moot. This case is hereby terminated.

Michael W. Dobbins, Clerk of Court
/s/ Carole Gainer, Deputy Clerk

Date: 8/20/09

APPENDIX B:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
MINUTE ORDER
(AUG. 20, 2009)

United States District Court, Northern District of Illinois

Case Number 08-c-6111

Date 8/20/09

Zmysly v. United States, *et al.*

Case 1 :08-cv-06111 Document 54 Filed 08/20/2009

For the reasons provided in this Minute Order, the Court grants defendants' motion to dismiss [doc. no. 38] because it lacks subject matter jurisdiction. All other motions pending before this Court are dismissed as moot. This case is hereby terminated.

STATEMENT

Yuriy Zmysly, through his representative and guardian, Aimee Zmysly, has sued the United States of America, Cherry Point Naval Hospital, David Kaplan, James Christopher and Chris Oudekerk, regarding medical care he received at Cherry Point Naval Hospital. Kaplan has moved to dismiss the complaint pursuant to Federal Rule of Procedure ("Rule") 12(b)(6) and the other defendants have moved to dismiss the complaint pursuant to Rule

12(b)(1). For the reasons provided in this Memorandum Opinion and Order, the Court grants defendants' motion to dismiss for lack of subject matter jurisdiction as to all defendants and dismisses all other pending motions as moot.

On January 9, 2006, Zmysly, an active-duty Marine, experienced severe abdominal pain, and after Dr. David Kaplan treated Zmysly in the emergency room, Zmysly was admitted into the Cherry Point Naval Hospital. On January 10, 2006, Dr. James Christopher diagnosed Zmysly with a perforated appendix. Chris Oudekerk, CRNA, intubated Zmysly and administered general anesthesia. Dr. Christopher then performed a laparoscopic appendectomy. Shortly after the appendectomy, complications arose, and Dr. Christopher performed an emergency cricothyroidotomy on Zmysly in order to establish an airway so that Zmysly could breathe. Zmysly was later transferred to Craven Regional Medical Center where medical personnel diagnosed him with an anoxic brain injury secondary to laryngeal edema and possible aspiration. Zmysly has been receiving medical benefits provided by the Veterans' Benefits Act since the time of his appendectomy.

On January 8, 2008, Zmysly filed a medical negligence claim under the Federal Torts Claim Act, 28 U.S.C. §§ 2671-80 ("FTCA") with the United States government. On March 25, 2008, the government denied Zmysly's claim. On October 24, 2008, Zmysly filed the instant action alleging medical negligence on the part of the United States through its agents or employees pursuant to the FTCA. In Count I, Zmysly alleges that he sustained personal and pecuniary injuries directly and

proximately caused by the negligent medical treatment provided by the defendants. In Count II, Zmysly asserts that the current application of the FTCA unjustifiably restricts his constitutional rights as guaranteed by the First, Fifth, Seventh, Ninth and Fourteenth Amendments.

When considering a motion to dismiss for lack of subject matter jurisdiction, the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the plaintiff. *Scott Air Force Base Props., LLC* v. *County of St. Clair, Ill.*, 548 F .3d 516, 519 (7th Cir. 2008). The court may also "look beyond the jurisdictional allegations of the complaint" to any evidence submitted on the issue for the purpose of determining whether subject matter jurisdiction exists. *Alicea-Hernandez* v. *Catholic Bishop of Chi.*, 320 F.3d 698, 701 (7th Cir. 2003).

The FTCA provides that the "United States shall be liable . . . to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Thus, the FTCA "serves as a broad waiver of federal sovereign immunity." *Stephenson* v. *Stone*, 21 F.3d 159, 162 (7th Cir. 1994). District courts have subject matter jurisdiction over FTCA claims pursuant to 28 U.S.C. § 1346(b).

Defendants argue that the Court's jurisdiction over this claim is barred by application of the *Feres* doctrine. In *Feres*, the Supreme Court held that "the Government is not liable under the Federal Torts Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to military service." *Feres v. United States*, 340 U.S. 135, 146 (1950) (emphasis in original). The

Feres doctrine has been consistently reaffirmed by both the Supreme Court and the Seventh Circuit over the last half century. *See, e.g., United States v. Johnson*, 481 U.S. 681, 686 (1987); *United States v. Shearer*, 473 U.S. 52, 57 (1985); *Smith v. United States*, 196 F.3d 774, 776 (7th Cir. 1999); *Jones v. United States*, *112* F.3d 299, 301 (7th Cir. 1997). "The dispositive inquiry remains whether the service-member stand[s] in the type of relationship to the military at the time of his or her injury that the occurrences causing the injury arose out of activity incident to military service." *Stephenson*, 21 F.3d at 162.

Zmysly argues that his appendicitis was not a consequence of military service. However, "courts have routinely applied *Feres* to bar medical malpractice claims that arose from treatment by military doctors of active-duty personnel. . . . This is true even where the underlying injury that brought the service member to the hospital was not caused by service." *Jones*, 112 F.3d at 302 (applying *Feres* to bar claim brought by an active-duty member of the Army for injuries resulting from surgery at a naval hospital to relieve chronic abdominal pain unrelated to military service); *see Selbe v. United States*, 130 F.3d 1265, 1268 (7th Cir. 1997) (applying *Feres* to bar claim brought by an active-duty member of the National Guard for negligent medical care of a broken hand unrelated to military service); *Borden v. Veterans Admin.*, 41 F .3d 763, 764 (1st Cir. 1994) (applying *Feres* to bar claim brought by an active-duty member of the Army against a military hospital for negligent treatment of a knee injury received while playing recreational basketball); *Collins v. United States*, 642 F.2d 217, 222 (7th Cir. 1981) (applying *Feres* to bar claim brought by an active-

duty U.S. Air Force Academy Cadet receiving negligent medical treatment from Air Force personnel for blurred vision unrelated to military service). "Once it is determined that a service member . . . was on active-duty during the time military medical treatment was rendered, the treatment is necessarily incident to service and judicial inquiry ends." *Jones*, 112 F.3d at 302 (quoting *Madsen* v. *United States*, 841 F.2d 1011, 1014 (10th Cir. 1987)).

Zmysly underwent an appendectomy procedure at Cherry Point Naval Hospital while he was an active-duty private in the U.S. Marines. Because he was on active-duty, his injury occurred in the course of activity incident to military service, and thus, the *Feres* doctrine bars his medical malpractice claim under the FTCA. Therefore, the instant action must be dismissed with prejudice as to all defendants for lack of subject matter jurisdiction.

Zmysly argues that the Supreme Court has not yet held that the *Feres* doctrine applies to medical malpractice claims made under the FTCA. However, two ofthe three cases decided in *Feres*, *i.e.*, *Jefferson v. United States* and *United States v. Griggs*, were based on medical malpractice allegations. 340 U.S. at 137. Thus, contrary to plaintiff's assertion, the Supreme Court has unequivocally held that the *Feres* doctrine bars medical malpractice claims brought under the FTCA by active-duty members of the armed services. *Id.* at 146.

Zmysly further asserts that the factual and legal bases for the *Feres* doctrine have changed significantly since *Feres* was decided. Such an

assertion, even if true, would not undermine the *Feres* doctrine's application to the instant action. In *Johnson*, the Supreme Court reaffirmed *Feres* based on three rationales: (1) the need to protect the distinctively federal relationship between the government and the armed forces, which could be adversely affected by applying differing tort laws; (2) the existence of statutory compensatory schemes; and (3) the need to avoid interference with military discipline. 481 U.S. at 688-91. *Post-Johnson*, these rationales continue to be recognized as adequate bases to support the application ofthe doctrine. *See Smith v. United States*, 196 F.3d 774, 776-77 (7th Cir. 1999); *Jones*, 112 F.3d at 301.

Zmysly believes that the Court has the authority to hold that the *Feres* doctrine is inapplicable to medical malpractice claims under the FTCA. He is mistaken. The foundational principle of *stare decisis* is based on a "hierarchical system" in which the decisions of a higher court are binding on lower courts. *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004). Unless the last decision by a higher court or statutory changes make it almost certain that the higher court would abrogate a given doctrine, the lower court is required to uphold and adhere to such a doctrine. *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734 (7th Cir. 1986). The *Feres* doctrine has been applied to medical malpractice cases brought by active-duty members of the military by the Supreme Court and Seventh Circuit for nearly sixty years. In addition, Congress has never modified the *Feres* doctrine since its inception in 1950. Although the Seventh Circuit has noted that there has been criticism of the doctrine and has even made reference to the "tenuous link" between the doctrine's rationales and

malpractice cases, the Supreme Court's decision in *Feres* has consistently been upheld. *See Selbe*, 130 F.3d at 1265-68; *Stephenson*, 21 F.3d at 162 (the *Feres* doctrine has become "black letter law"). Accordingly, the Court has no authority to hold that the *Feres* doctrine is inapplicable to the medical malpractice claim in the instant case.

In Count II, Zmysly argues that applying *Feres* to bar his medical malpractice action violates his constitutional rights provided by the First, Fifth, Seventh, Ninth and Fourteenth Amendments. In order for the Court to have jurisdiction over any suit against the federal government, there must be a clear statement from the government that waives sovereign immunity as well as a "claim falling within the terms of the waiver." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). "The terms of consent to be sued may not be inferred, but must be 'unequivocally expressed.'" *Id.* (quoting *Mitchell v. United States*, 445 U.S. 535, 538 (1980)).

In noting that no law ever existed that would permit "a soldier to recover for negligence . . . against . . . the Government he is serving," the Supreme Court has concluded that the FTCA did not create a cause of action allowing for active-duty members of the armed services to bring claims against the Government for injuries arising out of or in the course of activity incident to military service. *Feres*, 340 U.S. at 141, 146; *see Labash v. u.s. Dep't of Army*, 668 F.2d 1153, 1156 (10th Cir. 1982) ("Congress has chosen to limit the extent of the United States' waiver of sovereign immunity by restricting a serviceman to the specific remedies specified in the Veterans' Benefit Act."); *Seveny v.*

U.S. Gov't, Dep't of Navy, 550 F. Supp. 653, 659 (D.R.I. 1982) (applying the *Feres* bar to an FTCA claim and noting that "an action sounding in constitutional, as opposed to common law, tort is not exempt from application of the *Feres* doctrine . . . . To find otherwise would permit abrogation of *Feres-based* immunity through a mere exercise of pleading" in circumstances where the Supreme Court has "securely barred the doors to the courthouse." (quotation omitted)). *Cf. United States v. Stanley*, 483 U.S. 669, 684 (1987) (extending *Feres* by holding that no Bivens remedy is available for injuries that "arise out of in the course of activity incident to military service"). "The entire statutory mosaic under which our nation's military personnel are marshalled, deployed and maintained requires . . . that continued allegiance be given *Feres* with respect to service-related injuries." *Briggs v. United States*, 617 F. Supp. 1399, 1405 (D.R.I. 1985) (quotation omitted). Thus, there is no affront to legitimate constitutional rights by such adherence. *Id.*

Given *Feres* and its progeny, the government has not unequivocally expressed consent to be sued by active-duty members of the military, such as Zmysly. Therefore, Zmysly's cause of action against the government seeking a declaration that the *Feres* doctrine violates his constitutional rights fails as a matter of law. Accordingly, the Court dismisses the complaint without prejudice as to all defendants due to lack of subject matter jurisdiction.

Lastly, Zmysly opines that the *Feres* doctrine itself violates the separation of powers. For the same reasons discussed above, the Court lacks subject matter jurisdiction regarding this claim against the

government.

Further, the Court notes that the *Feres* Court did not create judicial legislation. Instead, the *Feres* Court examined the FTCA in order to construe it according to Congress' intent. "This Act, however, should be construed to fit . . . into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres*, 340 U.S. at 139. In its analysis, the *Feres* Court noted that Congress' primary purpose of the FTCA was to provide tort remedies against the government for those previously without. *Id.* However, Congress had previously provided active-duty members of the armed services a comprehensive system of relief by statute. *Id.* Hence, the *Feres* Court inferred that Congress did not intend or even contemplate that the FTCA would provide a means of recovery for injuries occurring "incident to military service." *Id.* at 144. Based on its analysis of Congress' intent, the *Feres* Court concluded: "We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command." *Id.* at 144; *see Stephenson*, 21 F.3d at 162; *Collins*, 642 F.2d at 219. As noted nearly forty years later in *Johnson*, Congress possesses a remedy to "alter misinterpretation of intent" but has not modified the *Feres* doctrine since its inception in 1950. *Johnson*, 481 U.S. at 686. In light of the *Feres* Court's analysis and the fact that Congress has not altered the Court's conclusion in nearly sixty years, the *Feres* doctrine does not violate constitutionally mandated separation of

powers. The Court grants defendants' motion to dismiss this action in its entirety.

For the foregoing reasons, the Court grants defendants' motion to dismiss [doc. no. 38] because it lacks subject matter jurisdiction. All other motions pending before this Court are dismissed as moot.

APPENDIX C:

DEFENDANTS-APPELLEES UNITED STATES, CHERRY POINT NAVAL HOSPITAL, JAMES CHRISTOPHER, AND CHRIS OUDEKERK MTOION FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, TO RESET BRIEFING SCHEDULE FILED IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (NOV. 18, 2009)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

U.S.C.A. -7th Circuit RECEIVED
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GINO J. AGNELLO

No. 09-3402

Appeal from the United States District Court for the Northern
District of Illinois, No. 08 C 6111
Ronald A. Guzman, District Judge

AIMEE ZMYSL Y, as representative
and guardian of YURIY ZMYSLY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
CHERRY POINT NAVAL HOSPITAL,
DAVID KAPLAN, JAMES CHRISTOPHER,
AND CHRIS OUDEKERK,

Defendants-Appellees.

MOTION BY DEFENDANTS-APPELLEES UNITED STATES, CHERRY POINT NAVAL HOSPITAL, JAMES CHRISTOPHER, AND CHRIS OUDEKERK FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, TO RESET BRIEFING SCHEDULE

Defendants-Appellees United States, Cherry Point Naval Hospital, James Christopher, and Chris Oudekerk (the fede0al defendants), by Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, in the interest of judicial economy, move for summary affirmance of the district court's decision dismissing this Federal Tort Claims Act action against them based on the *Feres* doctrine, and in support thereof state as follows:

1. Plaintiff-appellant Aimee Zmysly, as representative and guardian of Yuriy Zmysly, brings this medical malpractice action against the federal defendants under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. The complaint alleges that Yuriy Zmysly was an active-duty private in the U.S. Marine Corps at all relevant times, that he underwent an appendectomy at a military hospital (the Cherry Point Naval Hospital in Cherry Hills, North Carolina), that alleged negligence during the appendectomy caused him to suffer an hypoxic brain injury, and that he is now severely disabled. R. 1, Complaint ¶¶ 3, 4, 13, 14, 22, 32-35, 48, 57-58 and Ex. B.[1]

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[1] "R." references are to numbered items in the record on appeal. "App." references are to Zmysly's appendix.

2. On March 5, 2009, the federal defendants moved for dismissal from Zmysly's FTCA claim based on the *Feres* doctrine established by the Supreme Court in *Feres v. United States*, 340 U.S. 135 (1950). R. 38, 39. In *Feres*, the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146. Since *Feres*, the Supreme Court, this court, and many other circuits have repeatedly found that the *Feres* doctrine bars medical malpractice claims under the FTCA arising out of treatment by military doctors of active-duty personnel. *Griggs v. United States*, 178 F.2d 1, 2 (10th Cir. 1949), *rev'd sub nom., Feres v. United States*, 340 U.S. 135 (1950); *Jefferson v. United States*, 77 F. Supp. 706, 708 (D. Md. 1948), *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom., Feres v. United States*, 340 U.S. 135 (1950); *Selbe v. United States*, 130 F.3d 1265, 1268 (7th Cir. 1997); *Jones v. United States*, 112 F.3d 299, 302 (7th Cir. 1997); *Collins v. United States*, 642 F.2d 217 (7th Cir. 1981); *Cutshall v. United States*, 75 F.3d 426 (8th Cir. 1996); *Hayes v. United. States*, 44 F.3d 377 (5th Cir.), *cert. denied*, 516 U.S. 814 (1995); *Borden v. Veterans Administration*, 41 F.3d 763 (1st Cir. 1994); *Appelhans v. United States*, 877 F.2d 309 (4th Cir. 1989); *Madsen v. United States*, 841 F.2d 1011 (10th Cir. 1987); *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987); *Rayner v. United States*, 760 F.2d 1217 (11th Cir. 1985) (per curiam).[2]

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[2] The federal defendants' motion to dismiss also sought other relief unrelated to *Feres* and its progeny. R. 38, 39. That reliefis not discussed here because both the

3. After full briefing (R. 38, 39, 50, 53), on August 20, 2009, the district court issued a judgment and minute order dismissing this action pursuant to the *Feres* doctrine. App. 21-25. In its decision, the district court observed that the *Feres* doctrine has been consistently reaffirmed by both the Supreme Court and the Seventh Circuit, and that the *Feres* doctrine applies even when the underlying injury that brought the service member to the hospital was not caused by service. App.23. The district court further observed that the *Feres* doctrine has been repeatedly applied to medical malpractice cases brought by active-duty members of the military by both the Supreme Court and the Seventh Circuit for nearly sixty years. App. 24. In addition, Congress has never modified the *Feres* doctrine since its inception in 1950. *Id.* Accordingly, the district court correctly concluded that the *Feres* doctrine was binding "black letter law" that plainly barred Zmysly's FTCA claim. *Id.*

4. The district court also found that application of the *Feres* doctrine to Zmysly's medical malpractice claim was not an affront to any constitutional principles. App.24-25. In reaching this conclusion, the district court explained that the United States has not waived its sovereign immunity to constitutional claims by active-duty members of the military. *Id.* The district court also noted that the Supreme Court's decision in *United States v. Stanley*, 483 U.S. 669, 684 (1987), extended the *Feres* doctrine to bar individual-liability *Bivens* claims against federal employees for constitutional injuries that

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district court's decision and Zmysly's appeal focus exclusively on the *Feres* doctrine.

arise out of or in the course of activity incident to military service. App. 25. Lastly, the district court explained why the *Feres* doctrine did not violate constitutional separation of powers principles. *Id.* Accordingly, the district court granted the federal defendants' motion to dismiss. *Id.*

5. Zmysly's appellate brief asks this court to declare the *Feres* doctrine inapplicable to her FTCA claim because the rationales for the *Feres* doctrine allegedly fail to justify its application to medical malpractice claims. Zmysly Br. at 5-10. This argument fails on *stare decisis* grounds because, as Zmysly herself concedes, this court has already held that the allegedly tenuous link between the *Feres* rationales and medical malpractice claims does *not* render *Feres* inapplicable. Zmysly Br. at 10; *Selbe*, 130 F.3d at 1268. Zmysly also asks this court to declare the *Feres* doctrine inapplicable to medical malpractice claims by military personnel because doing otherwise will allegedly raise serious constitutional issues. Zmysly Br. at 10-19. Once again, however, this argument fails on *stare decisis* grounds because this court has already held on at least three occasions—in *Selbe* and *Jones* and *Collins*—that *Feres* bars medical malpractice claims arising out of treatment of active-duty personnel by military doctors. More importantly, moreover, Zmysly's position cannot prevail because two of the Supreme Court's three original *Feres* decisions, *Griggs* and *Jefferson,* reached the same result and are, of course, binding precedent. As this court stated succinctly in *Selbe*, "that is the end of the matter" unless and until the Supreme Court overrules *Feres* on its own. *Selbe,* 130 F.3d at 1268.

6. As this court has said, "[o]urs is a hierarchical

system," and when a lower court believes a superior court botched a decision, it may report its conclusions, but it is required to apply existing law. *Luna v. United States*, 454 F.3d 631,636 (7th Cir. 2006). "In a hierarchical system, decisions of a superior court are authoritative on inferior courts.... [T]he court of appeals must follow decisions of the Supreme Court whether or not we agree with them." *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir.2004); *see also A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002) ("The Justices have insisted that courts lower in the hierarchy apply their precedents unless overruled, even if they seem incompatible with more recent decisions."). It is not for us to explain plaintiff's strategy, but it is a safe assumption that she understands that this court is not free to disregard clear, long-established Supreme Court precedent -it must apply existing law, whether or not it agrees with it. What plaintiff needs from this court is her ticket punched so she can raise her serious issues before the Supreme Court, the only court that can overturn sixty years of its own clear precedent.

7. In *Mather v. Village of Mundelein*, this court concluded that "[m]otions papers, in conjunction with the record and the district court's opinion, may show the appropriate disposition with sufficient clarity that a call for briefs would be nothing but an invitation for the parties to waste their money and the court's time." 869 F.2d 356, 357 (7th Cir. 1989). Moreover, "[i]t is gratuitous cruelty to put counsel through the exercise ofwriting briefs ... when the outcome is foredoomed." *Id.* at 358. The district court's dismissal of the federal defendants based on the *Feres* doctrine warrants summary affirmance

under the procedure accepted in *Mather*. No productive purpose would be served by full briefing and argument on this issue. Indeed, summary affirmance will likely hasten the day on which Zmysly will be in a position to file a petition for a *writ of certiorari* with the only court that has the power to grant the relief she seeks.

WHEREFORE, the federal defendants requests that the court grant this motion and summarily affirm the district court's dismissal of them from this lawsuit. Should the court deny this motion, the federal defendants request an extension of 30 days thereafter to file their brief.[3]

Dated: November 18, 2009

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney
By:
SAMUEL S. MILLER
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 886-9083

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[3] This motion is not brought on behalf of individual defendant-appellee David Kaplan. He is represented by private counsel because he was employed by a contractor with the United States at the time of the incidents at issue, and therefore does not fall within the definition of a federal employee for purposes of the FTCA. 28 U.S.C. § 2671.

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that he caused a copy of the foregoing motion for summary affirmance to be served *by firstclass* mail on the person(s) listed below, on November 18, 2009.

Robert S. Peck
Center for Constitutional Litigation, P.C.
777 6th Street, N.W., Suite 520
Washington, D.C. 20001

Robert A. Clifford
Colin H. Dunn
Clifford Law Offices, P.C.
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Jean M. Prendergast
Charles H. Cole Richard J. Juarez
Schuyler, Roche & Crisham, P.C.
130 East Randolph Street, Suite 3800
Chicago, IL 60601

/s/Samuel S. Miller
Assistant United States Attorney

APPENDIX D:

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ORDER GRANTING SUMMARY AFFIRMANCE (DEC. 7, 2009)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Office of the Clerk
Room 2722-219 S. Dearborn Street
Chicago, Illinois 60604
Phone: (312) 435-5850
www.ca7.uscourts.gov

Case: 09-3402
Document: 13
Filed: 12/07/2009
Pages: 2

ORDER

December 7, 2009

Originating Case Information:
District Court No.: 1:08-cv-06111
Northern District of Illinois, Eastern Division
District Judge Ronald A. Guzman

BEFORE:

FRANK H. EASTERBROOK, Chief Judge
WILLIAM J. BAUER, Circuit Judge
RICHARD A. POSNER, Circuit Judge

No.: 09-3402

AIMEE ZMYSLY, as Representative and Guardian of the Person and ESTATE OF YURIY ZMYSLY, a disabled adult,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees

The following are before the court:

1) MOTION BY DEFENDANTS-APPELLEES UNITED STATES, CHERRY POINT NAVAL HOSPITAL, JAMES CHRISTOPHER, AND CHRIS OUDEKERK FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, TO RESET BRIEFING SCHEDULE, filed on November 18, 2009, by counsel for the government appellees and appellees Christopher and Oudekerk;

2) PLAINTIFF-APPELLANT'S OPPOSITION TO DEFENDANTS-APPELLEES' MOTION FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, TO RESET BRIEFING SCHEDULE, filed on December 1, 2009, by counsel for the appellant;

3) MOTION BY DEFENDANT-APPELLEE DAVID KAPLAN, M.D. FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, TO RESET THE BRIEFING SCHEDULE, filed on December 3, 2009, by counsel for appellee Kaplan;

4) REPLY IN SUPPORT OF MOTION BY DEFENDANTS-APPELLEES UNITED STATES, CHERRY POINT NAVAL HOSPITAL, JAMES CHRISTOPHER, AND CHRIS OUDEKERK FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, TO RESET BRIEFING SCHEDULE, filed on December 3, 2009, by counsel for the government appellees and appellees Christopher and Oudekerk.

The appellant's husband, an active duty member of the Marine Corps, was taken to a military hospital for an emergency appendectomy and came out with severe brain damage. The appellant launched a medical malpractice suit under the Federal Tort Claims Act against the U.S., the hospital, navy medical professionals, and a physician under contract with the military. The district court dismissed the case for lack of subject matter jurisdiction under *Feres v. U.S.*, 340 U.S. 135 (1950), which holds that there can be no FTCA recovery based on injuries to servicemen sustained during active duty, including injuries caused by negligent military medical treatment. *See also Selbe v. United States*, 130 F.3d 1265, 1266-68 (7th Cir. 1997). And as *Jones v. United States*, 112 F.3d 299, 301-02 (7th Cir. 1997), notes, it doesn't matter whether the initial need for medical care arose because, for example, an active duty service member was shot by enemy fire or instead was injured playing basketball or needed his appendix removed. The appellant's brief acknowledges that precedent is against her but argues that this court should revisit the issue based on policy considerations and a 6th Circuit case holding that FTCA recovery for injuries to a pregnant service member's fetus were not barred by *Feres* (because the fetus isn't in the military). *See*

Brown v. United States, 462 F.3d 609 (6th Cir. 2006). The *Feres* doctrine and its application to medical malpractice are well-established, and appellant's policy arguments and invocation of a clearly distinguishable out-of-circuit case cannot change that.

Accordingly, IT IS ORDERED that the appellees' motions are GRANTED and the judgment is summarily AFFIRMED.

APPENDIX E:

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ORDER DENYING MOTION TO RECONSIDER (DEC. 14, 2009)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Office of the Clerk
Room 2722-219 S. Dearborn Street
Chicago, Illinois 60604
Phone: (312) 435-5850
www.ca7.uscourts.gov

Case: 09-3402
Document: 15
Filed: 12/14/2009
Pages: 2

ORDER

December 14, 2009

Originating Case Information:
District Court No.: 1:08-cv-06111
Northern District of Illinois, Eastern Division
District Judge Ronald A. Guzman

BEFORE

FRANK H. EASTERBROOK, Chief Judge
WILLIAM J. BAUER, Circuit Judge
RICHARD A. POSNER, Circuit Judge

No.: 09-3402

AIMEE ZMYSLY, as Representative and Guardian of the Person and ESTATE OF YURIY ZMYSLY, a disabled adult,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA, et al.,

Defendants – Appellees

Upon consideration of the PLAINTIFF-APPELLANT'S OPPOSITION TO DEFENDANT-APPELLEE KAPLAN'S MOTION FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, TO RESET BRIEFING SCHEDULE, which this court construes as a motion to reconsider its order dated December 7, 2009,filed on December 10, 2009, by counsel for the appellant,

IT IS ORDERED that the motion is DENIED. Appellant has forfeited any argument that Kaplan is legally distinct from the other four defendants.

APPENDIX F:

28 U.S.C. § 2674

United States Code
Title 28. Judiciary and Judicial Procedure
§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon

SEP 16 2009

No. 09-1108

IN THE
Supreme Court of the United States

AIMEE ZMYSLY, AS REPRESENTATIVE AND GUARDIAN OF THE PERSON AND ESTATE OF YURIY ZMYSLY, A DISABLED ADULT,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF ALEXIS WITT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

United States Air Force Staff Sergeant ("SSgt.") Dean Patrick Witt was one of the thousands of U.S. service men and women victimized by serious medical malpractice in U.S. military hospitals. The suffering of these military personnel, as well as of their spouses and children, has been compounded by the application of the so-called *Feres* doctrine — a judicial gloss on the Federal Tort Claims Act ("FTCA") created by this Court in *Feres v. United States*, 340 U.S. 135 (1950).

In October 2003, SSgt. Witt was a healthy 25 year old serving as a recruiter in the U.S. Air Force. He was married to Alexis Witt and had two young children. Pursuant to a permanent change of station order, SSgt. Witt was on temporary leave and in the process of moving his family from Hill Air Force Base in Utah to Travis Air Force Base in California. While Alexis Witt remained in Utah with their young children, SSgt. Witt moved his family's belongings into their new home. Alexis and SSgt. Witt planned to reunite the family as soon as SSgt. Witt got settled in California.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that (1) no counsel for a party authored this brief in whole or in part and (2) no person or entity other than the Supreme Court Clinic of the University of Texas Law School (which represents *amicus* on a pro bono basis) made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel for *amicus* represent that all parties were provided notice of *amicus*'s intention to file this brief at least 10 days before its due date. Counsel for *amicus* also represent that all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

The family never reunited. On October 10, 2003, SSgt. Witt sought treatment for severe abdominal pain at David Grant Medical Center, the base hospital associated with Travis Air Force Base. He was diagnosed with acute appendicitis, and, twenty days before he was scheduled to report to his commanding officer at Travis Air Force Base, SSgt. Witt underwent what should have been a routine appendectomy at the base hospital. Although the appendectomy was, in fact, routine, his post-operative care was grossly negligent. As a result, SSgt. Witt suffered a catastrophic brain injury and lapsed into a coma. In less than three months, "[a] 25 year old man who devoted his life to serving his country" would die of his injuries "through no fault of his own." *Witt v. United States*, No. 2:08-CV-02024, 2009 U.S. Dist. LEXIS 9451, at *6 (E.D. Cal. Feb. 10, 2009), *appeal pending*, No. 09-15339 (9th Cir.).

The facts underlying the Witt family's tragedy are undisputed. Following an "uncomplicated" appendectomy performed by Lt. Col. (Dr.) Eric Ifune under general anesthesia with an endotracheal intubation (a breathing tube), SSgt. Witt was extubated[2] by a student registered nurse anesthesiologist and transported to the recovery room. The supervising certified registered nurse anesthetist, U.S. Air Force Major Rachael Delaporte, chose not to accompany her patient while he was being moved. Rather, she stayed behind to gather supplies used in the surgery and followed approximately 20 paces behind. While being transported, SSgt. Witt exhibited signs of post-operative respiratory distress — his breathing became

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[2] Extubation is a medical procedure in which the tube responsible for delivering oxygen to the patient's lungs during surgery is removed from his airway.

shallow and his skin took on a bluish hue. In response to his distress, the student anesthesiologist wheeled him into a nearby pediatric recovery area and attempted to open his airway to ventilate him. The student anesthesiologist was unsuccessful in her attempt to ventilate SSgt. Witt.

When Major Delaporte caught up with her patient, she also attempted to ventilate SSgt. Witt. This second attempt failed because she used pediatric equipment that lacked the air capacity needed to ventilate her adult patient. Major Delaporte then attempted a direct endotracheal intubation — a procedure that involves inserting a tube directly into a patient's trachea to facilitate mechanical ventilation. This attempt failed because she incorrectly inserted the intubation tube into SSgt. Witt's esophagus rather than his trachea, thus completely depriving him of oxygen. During these failed attempts to revive SSgt. Witt, Major Delaporte neglected to signal a "Code Blue," an act that would have called a resuscitation team to assist her in this emergency. Eventually, an M.D. anesthesiologist arrived and performed a second endotracheal intubation, which was successful. By then, SSgt. Witt had been deprived of oxygen for seven to ten minutes. He suffered a severe brain injury as a result and, without ever regaining consciousness, died of his injuries after a three-month coma.

The negligent care provided to SSgt. Witt is well-documented. An independent certified registered nurse anesthetist reviewed SSgt. Witt's medical records and cited nineteen separate breaches of the standard of care during his treatment. Upon investigation by the California Board of Nursing, Major Delaporte admitted that she was guilty of gross

negligence and/or incompetence. She surrendered her nurse anesthetist license to the Board.

After learning of the negligent care that caused the death of her husband, *amicus* Alexis Witt filed an administrative claim with the United States Air Force, in accordance with 28 U.S.C. §§ 2672 and 2675(a). The Air Force claims administrator offered Alexis Witt the service's "most profound sympathy for the unimaginably tragic loss of SSgt Witt," but, citing *Feres* and cases applying *Feres*, concluded that "the law allows me no other choice but to deny [the] claim." Letter from Hildegarde Conte Perlstein Denying Claim No. 05-687, at 1 (Mar. 7, 2008).

Mrs. Witt then brought suit under the FTCA, 28 U.S.C. §§ 1346, 2671 *et seq.*, naming the United States as the sole defendant. In this action, she alleged that negligent medical care provided by employees of the United States acting within the scope of their employment caused the injuries to and wrongful death of SSgt. Witt.

The United States District Court for the Eastern District of California felt "duty-bound" to dismiss Mrs. Witt's claim, basing its opinion solely on the application of the *Feres* doctrine. *Witt*, 2009 U.S. Dist. LEXIS 9451, at *6. Nonetheless, the district court struggled with a result that it said "can only be characterized as unfair and irrational." *Id.* at *7. As a result, the court "encourage[d] the Ninth Circuit to consider the Feres Doctrine en banc, especially in light of the inequitable result of its application in this case," and closed with a similar plea to this Court, asserting that "now is the time to revisit the *Feres* doctrine." *Id.* at *6–*7.

Alexis Witt's case is currently pending before the United States Court of Appeals for the Ninth Circuit,

with oral argument scheduled for May 11, 2010. If this Court grants the pending petition of Yuriy Zmysly and decides to revisit its questionable interpretation of the FTCA in *Feres*, the Ninth Circuit would likely remand Alexis Witt's case for further proceedings in the district court. If the Court denies Zmysly's petition and the Ninth Circuit concludes that the *Feres* doctrine bars Alexis Witt's claim, she intends to seek review in this Court, and this Court will hear Alexis Witt's plea as a petitioner rather than an *amicus*.

ARGUMENT

Amicus Alexis Witt joins the ever-increasing chorus of victims, victims' families, scholars, lawyers, and judges who urge this Court to reconsider the Court's unsustainable interpretation of the FTCA to bar active-duty service members' recovery for injuries caused by negligent medical care provided by hospitals operated by the United States Armed Services.

I. *FERES* WAS WRONGLY DECIDED

"*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting) (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y.), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)). In *Feres*, this Court created an exception to governmental liability under the FTCA ungrounded in either text or legislative history. The Court has since largely abandoned the reasons asserted in *Feres* as justifications for this extension. And additional justifications proffered since *Feres* do not withstand close scrutiny. The resulting doctrine, untethered to the statutory text and unsupported by

coherent policy goals, has sown confusion among the lower federal courts and inequities among claimants. *Feres* should be overruled.

A. The *Feres* Doctrine Finds No Support In The Text Of The FTCA

The notion that Congress intended to exclude intramilitary suits from the jurisdiction of the United States district courts finds no support in the plain text of the FTCA. The FTCA waives traditional sovereign immunity for the tortious conduct of government employees. In particular, the FTCA renders the government liable

> [f]or money damages . . . for injury or loss of property, personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

This provision renders the United States liable to all persons, including service men and women, injured by the negligence of government employees. *See Johnson*, 481 U.S. at 693 (Scalia, J., dissenting). While other provisions of the Act set forth thirteen highly detailed exceptions to this broad waiver of immunity, none evinces an intent generally to preclude suits brought by members of the Armed Services. In fact, in the only provision aimed directly at suits implicating the military, Congress expressly excluded from the reach of the FTCA

> [a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, *during time of war.*

28 U.S.C. § 2680(j) (emphasis added).

Notwithstanding the lack of textual justification for exempting all suits brought by military personnel, *see Brooks v. United States*, 337 U.S. 49, 51 (1949), this Court in *Feres* created a sweeping exception to the FTCA for "injuries to servicemen [that] arise out of or are in the course of activity incident to service." 340 U.S. at 146. This exception has come to be known as the *Feres* doctrine.

The *Feres* doctrine is untenable as an exercise in statutory interpretation. As Justice Scalia's dissent in *Johnson* makes clear, the text of the statute indicates that Congress likely intended the FTCA to confer federal jurisdiction over claims by active duty military personnel. *See* 481 U.S. at 693 (Scalia, J., dissenting) (inferring from FTCA's sweeping language of liability and limited language excluding damages arising out of combatant activities that it "renders the United States liable to *all* persons, including servicemen"). Indeed, in this Court's first encounter with an FTCA suit brought by a service member, it gave effect to the plain reading of the statute and permitted a negligence action brought by military personnel injured in a collision with an Army truck while off duty. *See Brooks*, 337 U.S. at 51 ("We are not persuaded that 'any claim' means 'any claim but that of servicemen.'").

Moreover, as Justice Scalia also noted in his *Johnson* dissent, the fact that Congress specifically considered and provided for the special requirements of the military during combat indicates that it did not intend a broad, incident-to-service bar. *See* 481 U.S.

at 693 (Scalia, J., dissenting). As the Court reasoned in *Brooks*, the express exception contained in the FTCA is "too lengthy, specific, and close to the present problem . . . [that] [i]t would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed." 337 U.S. at 51. Thus, there remains "no proper basis for [this Court] to supplement . . . congressional disposition" with non-textual exceptions to the FTCA. *Johnson*, 481 U.S. at 693 (Scalia, J., dissenting).

B. No Sound Policy Justifies The *Feres* Doctrine's Prohibition On Suits By Members Of The Armed Services

In support of its judicially crafted incident-to-service bar, the *Feres* Court offered several policy rationales. *See* 340 U.S. at 142–45. In subsequent cases, new justifications were added to the list while others appeared to drop off. *See, e.g., Johnson*, 481 U.S. at 690–91 (invoking new justifications); *United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985) ("Although no longer controlling, other factors mentioned in *Feres* are present here."); *Lombard v. United States*, 690 F.2d 215, 229 n.7 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part) ("[T]he Court occasionally seemed to retreat from certain aspects of the reasoning underlying the doctrine."). As Justice Scalia has noted, "none of these rationales justifies the result." *Johnson*, 481 U.S. at 694 (Scalia, J., dissenting). The *Feres* doctrine remains a judicial embellishment of an unambiguous statute that lacks any coherent policy rationale.

II. *FERES* LEADS TO UNJUST AND IRRATIONAL OUTCOMES

The FTCA permits recovery against the government by civilians, veterans, and military dependents when, in identical situations, the *Feres* doctrine prevents recovery by military service members. This absolute bar to recovery for members of the Armed Service for any tort suffered "incident to service" imposes a gross injustice on our military personnel. *See United States v. Brown*, 348 U.S. 110, 114 (1954) (Black, J., dissenting) ("To permit a veteran to recover damages from the Government in circumstances under which a soldier on active duty cannot recover seems like an unjustifiable discrimination which the Act does not require.").

Compounding this injustice are the unpredictable and seemingly arbitrary outcomes of cases in which *Feres* is implicated. The examples are legion. In *Kelly v. Panama Canal Commission*, 26 F.3d 597, 599–600 (5th Cir. 1994), the Fifth Circuit permitted a service member to recover damages from an accident that occurred in a boat rented from an on-base marina, because he was off-duty and off-base when injured. But in *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001), the Ninth Circuit applied *Feres* to bar a suit brought on behalf of a sailor who was injured during a "recreational rafting trip" led by a civilian in which she participated while "off duty and on liberty."

The inequities are expanded when the *Feres* doctrine intersects with the increasing role of women in the service and the reality that pregnant service women seek prenatal care in military facilities. Although the *Feres* doctrine does not bar suits by spouses and dependents of service members, courts

have arrived at conflicting results when claims are brought on behalf of dependents injured by negligent prenatal care. The Fifth Circuit has held that, when the *Feres* doctrine normally would bar recovery by the mother for negligent medical care, it also bars recovery by the mother's child for prenatal injuries caused by that negligent care. *See Scales v. United States*, 685 F.2d 970, 973–74 (5th Cir. 1982). The Sixth Circuit, in contrast, permitted a child to recover for injuries caused by negligent prenatal care, because the particular care at issue was not directed at the mother, but only at the unborn baby. *See Brown v. United States*, 462 F.3d 609, 615–16 (6th Cir. 2006).

The Eleventh Circuit applied the *Feres* doctrine to a tragic case in which negligent prenatal care led to the premature birth of twin boys. *See Del Rio v. United States*, 833 F.2d 282, 284 (11th Cir. 1987). One of the boys was severely injured but survived, while his twin died five days after he was born. The court held that *Feres* barred the boys' mother from recovering for her injuries when she received negligent prenatal care at a military hospital. *Id.* at 286. The court further held that the mother was precluded from recovering for the wrongful death of her deceased child, because she (as personal representative) would receive the benefits of any recovery. *Id.* at 288. But the court concluded that none of the rationales underlying the *Feres* doctrine would be implicated by a suit on behalf of the surviving twin, so the court permitted that suit to go forward. *Id.*

The difference between being *Feres*-barred and having access to recovery is sometimes the difference between a long weekend and a normal commute. *Compare Parker v. United States*, 611 F.2d 1007,

1015 (5th Cir. 1980) (holding that service member's family could recover for his death, which occurred while he was leaving the base for a four-day weekend), *with Richards v. United States*, 176 F.3d 652, 656 (3d Cir. 1999) (barring recovery when service member was killed while leaving the base for the day). The distinctions separating these cases often are extremely narrow, "fine distinctions that are often determinative" of whether an injured service member has a right to recover. *Dreier v. United States*, 106 F.3d 844, 852 (9th Cir. 1996). The dissent in *Johnson* provided a hypothetical that illustrated "inconsistencies . . . attributable to *Feres*" and the disharmony in the law created by "ignoring what Congress wrote and imagining what it should have written." 481 U.S. at 702 (Scalia, J., dissenting). Coupled with these few examples of *Feres*'s inequities, the confusion and unjustness of *Feres* are readily apparent.

As some of the circuits have admitted, there is no principled way to draw distinctions in *Feres* doctrine cases beyond attempting to compare the facts of particular cases to see if, in those cases, recovery was allowed. *See, e.g.*, *Costo*, 248 F.3d at 867 ("[W]e have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable, and thus, 'comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine' is the most appropriate way to resolve *Feres* doctrine cases.") (quoting *Dreier*, 106 F.3d at 848). In practice, this means that the lower courts, depending on the level of generality they choose to apply, have wide discretion to permit or prohibit a service member's suit.

Feres has thus become a legal doctrine unconnected with statutory text, detached from its underlying

rationale, and implemented by the lower courts in uncertain and inequitable ways.

III. THE TIME IS RIPE FOR THIS COURT TO REVIEW THE *FERES* DOCTRINE

The time is ripe to review the *Feres* doctrine. At the very least, this Court should reconsider whether the doctrine should apply to bar claims by service members injured by the military's medical malpractice.

A. More Than Twenty Years Have Passed Since This Court's Last Review Of *Feres*

This Court last reviewed the *Feres* doctrine's scope twenty-three years ago. In *Johnson*, a helicopter pilot for the United States Coast Guard died while performing a rescue operation in accordance with his official duties. *Id.* at 682–83. Those facts, this Court held, fell "within the heart" of the *Feres* doctrine's bar to military service members from suing the United States for injuries that "'arise out of or are in the course of activity incident to service.'" *Id.* at 692, 686 (quoting *Feres*, 340 U.S. at 146). Examining those facts, which fell squarely within the traditional interpretation of the *Feres* doctrine, the four *Johnson* dissenters questioned whether the rationales underlying *Feres* could "justif[y] the result" in *Feres* itself. *Id.* at 694 (Scalia, J., dissenting).

The strong dissent in *Johnson* demonstrates that questions arose about the broad application of the judicially created *Feres* doctrine in the years between *Feres* and *Johnson*. This Court has left those questions unanswered in the intervening decades, during which lower courts have struggled to apply a doctrine that even members of this Court admit is no longer supported by its stated rationales.

B. *Johnson*'s Re-Affirmation Of *Feres* Did Not End Criticism Of The Doctrine

Even after this Court's last affirmation of the *Feres* doctrine in *Johnson*, members of this Court and lower courts have criticized the *Feres* doctrine's broad application. *See, e.g., United States v. Stanley*, 483 U.S. 669, 705 (1987) (Brennan & Stevens, JJ., concurring in part, dissenting in part) (criticizing the Court's application of the *Feres* doctrine).

In *amicus* Alexis Witt's case just last year, the district court "reluctantly" granted the government's *Feres* motion to dismiss the case, but not without criticizing the doctrine. *Witt*, 2009 U.S. Dist. LEXIS 9451, at *6–*7. Indeed, the court declared that "[t]he alleged facts in the instant case are so egregious and the liability of the Defendant seems so clear that this Court did give serious consideration to Plaintiff's argument that [it] should allow this claim in spite of *Feres*." *Id.* at *5–*6. *See also, e.g., Tootle v. USDB Commandant*, 390 F.3d 1280, 1283 (10th Cir. 2004) ("Notwithstanding potential equal protection concerns about the *Feres* doctrine, . . . this panel is bound to follow the decisions of the Supreme Court and the published decisions of this court."); *Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678, 683 (1st Cir. 1999) ("A few of *Feres*'s original reasons no longer seem so persuasive, and intrusions by courts to grant equitable relief in military matters have become more familiar in recent years.") (citation omitted).

C. If This Court Postpones Its Review Of The *Feres* Doctrine, Service Members Will Continue To Be Denied Access To Remedies For Their Injuries

As is inevitably true, the reported decisions represent only the tip of the iceberg. Each year many

hundreds of military personnel are injured through medical malpractice in the nation's military hospitals. Hundreds (if not thousands) more are injured as a result of other forms of negligence by the government and its employees. While similarly situated civilian employees — and even the dependents of military personnel — can seek just compensation for their injuries under the FTCA, thousands of young men and women "who [have] devoted [their] li[ves] to serving [their] country," *Witt*, 2009 U.S. Dist. LEXIS 9451, at *6, are denied the remedy that Congress intended them to have. Every year that this Court waits to correct the error made in *Feres* simply compounds the injustice and deprives thousands more of their rights.

IV. COURTS AND SCHOLARS HAVE OVERWHELMINGLY CALLED FOR *FERES* TO BE OVERTURNED

A. Members Of This Court And Several Lower Courts Have Roundly Criticized *Feres*

The list of voices calling for this Court to revisit *Feres* is long and distinguished. Justice Scalia, joined by Justice Stevens and two other members of the Court, has characterized the "'widespread, almost universal criticism' [*Feres*] has received" as "heartily deserve[d]." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). In that dissent, Justice Scalia included a lengthy footnote listing critics of the doctrine. *See id.* at 701 n.*.

Justice Ginsburg, while serving as a circuit judge, was constrained to follow the *Feres* doctrine but described it as "problematic" and dissented from a panel decision extending its application. *See Lombard*, 690 F.2d at 233 (Ginsburg, J., concurring in part and dissenting in part); *see also id.* at 229 nn.6-7 (describ-

ing problems with the *Feres* Court's analysis and observing that "the soundness of the *Feres* Court's interpretation of the FTCA continues to be questioned").

Since Justice Scalia compiled his collection of criticism, the "widespread, almost universal criticism" of *Feres* has become even more pronounced. It has become commonplace for judges whose hands are tied by *Feres* openly to criticize or even apologize for the unjust results that they are bound to reach. *See, e.g.*, *Richards*, 176 F.3d at 657 ("Thus, we are left with a counter-intuitive and inequitable result simply because of Private Richards's military status. It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it."); *Bowers v. United States*, 904 F.2d 450, 452 (8th Cir. 1990) ("We reach this result with a pronounced lack of enthusiasm."); *Loughney v. United States*, 839 F.2d 186, 187 & n.2 (3d Cir. 1988) ("We are sympathetic to [plaintiff's] legal arguments, and we are distressed by the tragic circumstances that gave rise to her suit."; "This Court has previously expressed its dissatisfaction with applying the *Feres* doctrine to cases of medical malpractice."); *Witt*, 2009 U.S. Dist. LEXIS 9451, at *5–*6 ("The alleged facts in the instant case are so egregious and the liability of the Defendant seems so clear that this Court did give serious consideration to Plaintiff's argument that [it] should allow this claim in spite of *Feres*. . . . [*Feres*'s] application to this case seems particularly unfair. However, as wrong-headed as it may seem, this Court is duty-bound to follow precedent and abide by the decisions of the Ninth Circuit and Supreme Court.").

While the tragic facts of a particular case may serve to compound the perceived injustice worked by the application of the *Feres* bar, the judicial criti-

cisms lodged against *Feres* often transcend the facts of individual cases, aiming instead at the shaky legal foundation upon which the decision rests. Courts have questioned the *Feres* decision's substantial departure from the text of the FTCA,[3] noted the unpersuasive nature of the original reasoning underlying the *Feres* decision,[4] and criticized the confusion wrought by *Feres* and its progeny.[5]

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[3] *See Matreale v. New Jersey Dep't of Military & Veterans Affairs*, 487 F.3d 150, 159 (3d Cir. 2007) (Smith, J., concurring) ("A long line of Supreme Court cases, beginning with *Feres v. United States*, have been decided in seeming opposition to Congress' clearly expressed intent in the FTCA as to the scope of intra-military immunity."); *Richards v. United States*, 180 F.3d 564, 564 (3d Cir. 1999) (Rendell, J., dissenting from denial of a petition for rehearing en banc) ("This case presents yet another compelling argument for the abandonment of the *Feres* doctrine. *Feres* represents more than a 'bad estimation[]' of what Congress intended to do (but did not do), in the [FTCA]."); *Lombard*, 690 F.2d at 229 n.6 (Ginsburg, J., concurring in part and dissenting in part) ("No explicit provision in the [FTCA] required the *Feres* holding. The FTCA contains several specific exceptions, including one for '[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.' The incidents at issue in *Feres* occurred in peacetime and did not involve 'combatant activities.'") (citations omitted).

[4] *See, e.g.*, *Day*, 167 F.3d at 683 ("A few of *Feres*'s original reasons no longer seem so persuasive, and intrusions by courts to grant equitable relief in military matters have become more familiar in recent years.") (citation omitted); *Backman v. United States*, No. 97-2271, 1998 WL 421955, at *3 (10th Cir. July 23, 1998) (judgment noted at 153 F.3d 726) (Henry, J., concurring) ("I write separately in order to note that the somewhat dubious foundation of *Feres* seems to be weakening."); *Estate of McAllister v. United States*, 942 F.2d 1473, 1476 (9th Cir. 1991) ("A comparison of reasoning with outcomes in cases that have applied the doctrine validates these concerns: the results have not flowed easily from the doctrine's purported rationales.");

And the outcry against *Feres* does not end there. Lower courts have also cited practical considerations unforeseen to the court in 1950, such as the increasing role of the military in non-combat functions, as a reason the decision should be reconsidered or clarified. *See, e.g., Overton v. New York State Div. of Military & Naval Affairs*, 373 F.3d 83, 100 (2d Cir. 2004) (Pooler, J., concurring in the judgment) (citing Jonathan Turley, *Pax Militaris: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 34-35 (2003); *Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1487 (9th Cir. 1991)).

B. Lower Courts Have Called On This Court To Reconsider *Feres*

In light of the widespread criticism, it is not surprising that many lower courts have explicitly called upon this Court to reexamine its decision in *Feres*. In *amicus* Alexis Witt's case, the district court that "reluctantly" granted the government's motion to dismiss the case also "join[ed] in [an earlier] plea to the Supreme Court . . . that now is the time to revisit the *Feres* doctrine. Otherwise, *Feres* will once again

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Bozeman v. United States, 780 F.2d 198, 200 (2d Cir. 1985) ("The original rationales for the holding in *Feres* have been undercut."); *Monaco v. United States*, 661 F.2d 129, 131-32, 134 & n.3 (9th Cir. 1981) ("The *Feres* doctrine today stands on shaky ground with its precise justification somewhat confused.").

[5] *See, e.g., Schoenfeld v. Quamme*, 492 F.3d 1016, 1019 (9th Cir. 2007) (describing the circuit's *Feres* jurisprudence as "something of a muddle"); *Costo*, 248 F.3d at 867 ("[T]he cases applying the *Feres* doctrine are irreconcilable."); *Taber v. Maine*, 67 F.3d 1029, 1032 (2d Cir. 1995) ("[W]e would be less than candid if we did not admit that the *Feres* doctrine has gone off in so many different directions that it is difficult to know precisely what the doctrine means today.").

have led to a result that can only be characterized as unfair and irrational." *Witt*, 2009 U.S. Dist. LEXIS 9451, at *7. *See also, e.g.*, *Richards*, 180 F.3d at 565 (Rendell, J., dissenting from denial of a petition for rehearing en banc) ("I urge the Supreme Court to grant certiorari and revisit what we have wrought during the nearly fifty years since the Court's pronouncement in *Feres*."); *O'Neill v. United States*, 140 F.3d 564, 566 (3d Cir. 1998) (Becker, J., dissenting from denial of a petition for rehearing en banc) ("I urge the Supreme Court to grant *certiorari* and reconsider *Feres*."); *cf. Day*, 167 F.3d at 683 ("Possibly *Feres* itself deserves reexamination by the Supreme Court. . . . [T]he Supreme Court has increasingly reminded the lower federal courts that departures from prior Supreme Court precedent should not normally be pioneered by circuit or district judges.").

C. Respected Commentators Have Denounced *Feres*

The American Bar Association ("ABA") has taken the official position that the *Feres* doctrine is "unnecessary, unwarranted, and patently unfair and unjust." ABA House of Delegates Resolution 10B, at 14 (2008) ("ABA Resolution 10B"), *available at* http://www.abanet.org/leadership/2008/annual/recommendations/TenB.doc. The ABA has solidified its opposition to *Feres* in two separate resolutions. The first resolution, passed in 1987, opposed the application of *Feres* to malpractice cases, *see id.* at 15, where the military discipline rationale is weakest. In 2008, the ABA expanded its criticism beyond the context of medical malpractice to the *Feres* doctrine as a

whole.[6] *See* ABA Legislative Issues List at 95, *available at* http://www.abanet.org/poladv/documents/legiss.pdf; ABA Resolution 10B, at 1.

The Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice also called for a reconsideration of the *Feres* doctrine. *See* HONORABLE WALTER T. COX III, ET AL., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE § IV.C (May 2001), *available at* http://www.wcl.american.edu/nimj/cox_commission.cfm. Although the *Feres* doctrine was beyond the scope of the original agenda, the Commission nevertheless suggested reconsideration because so many of the claims barred by the *Feres* doctrine "bear little if any relation to the performance of military duties or obedience to orders on their merits." *Id.*

Legal scholars have also published a steady stream of articles criticizing *Feres* over the past few decades.[7] Most notable among these are two such articles that were written by serving military officers. *See* Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment*

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[6] These ABA Resolutions urged legislative action to overturn *Feres*, but the rationale behind them and the reasons motivating their passage apply with equal force to this Court's reconsideration of the *Feres* doctrine.

[7] *See, e.g.*, Turley, 71 GEO. WASH. L. REV. at 2 ("Both academics and lower courts have condemned the doctrine as unfounded, unfair, and even un-American."); Note, *From* Feres *to* Stencel: *Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099, 1101, 1121–25 (1977) (arguing that the textual exceptions to governmental liability set out in the FTCA, "particularly the exception for 'discretionary actions' by government employees, would adequately protect all legitimate military interests").

in Today's Army, 30 HARV. J.L. & GENDER 151, 185–92 (2007); Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated* Feres *Doctrine*, 192 MILITARY L. REV. 1 (2007).

Major Brou, then a Judge Advocate in the U.S. Army, offers a number of solid criticisms of *Feres*. Among them, Brou argues that *Feres* prevents the government from reaping the prophylactic results that tort liability might otherwise provide,[8] interferes with separation of powers,[9] and is in fact not supported by the rationales put forth by the *Feres* Court.[10] With respect to military discipline, Brou argues that "[a]llowing service members to sue under the [FTCA] for injuries or death due to a military doctor's medical malpractice does not harm military discipline or decision making . . . because military physicians rarely, if ever, serve as commanders or leaders." 192 MILITARY L. REV. at 56. In the broader context (beyond medical malpractice), Brou argues

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[8] "Because [FTCA] suits can focus judicial and public attention on an organization's shortcomings, government organizations facing suit for negligence under the [FTCA] may be more inclined to take measures to prevent recurrences of such negligence. This could improve the efficient and safe operation of the agency. However, the *Feres* doctrine destroys this incentive to prevent future acts of negligence by allowing the Government to evade liability for injuries a negligent government employee inflicts upon a service member." Brou, 192 MILITARY L. REV. at 33.

[9] "In creating the incident to service test, the Supreme Court ignored the plain meaning of the [FTCA] and created an additional exception to the Act. Apart from its anomalous line of *Feres* doctrine cases, the Court has found that the Act broadly waives sovereign immunity, and has repeatedly rejected judicial expansions of the Act's exceptions." *Id.* at 35–36.

[10] *See id.* at 40–59.

that, "[e]ven though the *Feres* doctrine protects [military discipline], it is too broad. Applying the [FTCA's] plain language and enumerated exceptions, such as the discretionary function exception, can preserve the military's decision and policy-making authority while affording service members rights commensurate with those of civilians under the [FTCA]." *Id.* at 59.

Hollywood, also a Judge Advocate General in the U.S. Army at the time her article was published, agrees with Brou that "the military discipline rationale on which [*Feres*] rests today cannot logically be sustained. On the most basic level, 'if servicemembers believe that the military treats its personnel fairly, they may be more likely to accept and meet the demands of their jobs.'" 30 HARV. J.L. & GENDER at 191 (quoting Robin Rogers, Comment, *A Proposal for Combatting Sexual Discrimination in the Military: Amendment of Title VII*, 78 CAL. L. REV. 165, 192 (2000)).[11]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[11] Although Hollywood advocates for the overturning of *Feres* so that "female soldiers who have been the victims of sexual harassment must be given the same rights for redress as their civilian counterparts," Hollywood, 30 HARV. J.L. & GENDER at 186, her examination of *Feres* goes well beyond this context.

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